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No. _____

In the

Supreme Court of the United States

October Term, 1994

MARK D. CAMERON, STEVEN W. CAMERON, AND LAURIE CAMERON,

Petitioners,

vs.

GENERAL MOTORS CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Henry E. Hudson
Counsel of Record
James S. Crockett, Jr.
Claudia T. Salomon
Mays & Valentine
1111 E. Main Street
P. O. Box 1122
Richmond, Virginia 23208-1122
(804) 697-1200

Counsel for Petitioners

Balmar Legal Publishing Department, Washington, D.C. (202) 682-9800

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QUESTIONS PRESENTED

1. Whether, a court of appeals may find the requisite "exceptional circumstances" to justify vacatur of a district court's order after the underlying action has been settled, based upon the merits of the order, the supposed intent of the parties in settlement, and the order's potential precedential value, contrary to this Court's holding in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, ___ U.S. ___, 115 S. Ct. 386 (1994).

2. Whether, a court of appeals may find "exceptional circumstances" to order vacatur of a district court's order after the underlying action is settled, which has the effect of extending the jurisdiction of the court to an action pending in a United States district court in another circuit.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Mark D. Cameron, Steven W. Cameron, and Laurie Cameron (collectively, "the Camerons") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this matter.[1]

OPINIONS BELOW

The Fourth Circuit's order of vacatur, for which review is sought, is reproduced in Appendix A. The order of the United States District Court for the District of South Carolina (the "District Court"), which the Fourth Circuit vacated, is reproduced in Appendix B. Neither order is reported.

JURISDICTION

The Fourth Circuit entered its order vacating the District Court's order on February 17, 1995. App. A. By order entered March 15, 1995, the court of appeals denied the Camerons'

[1] All parties to the proceedings below are identified in the caption.

timely Petition for Rehearing and Suggestion for Rehearing En Banc. App. C. This petition is filed within ninety days of entry of the March 15, 1995 order. *See* 28 U.S.C. § 2101(c). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, § 2 of the U.S. Constitution limits the judicial power of the federal courts to all "cases" and "controversies."

28 U.S.C. § 2106 provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside, or reverse any judgment, decree, or order of a court lawfully brought before it for review and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. § 1294 provides, in relevant part, that

"appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows: (1) from a district court of the United States to the court of appeals for the circuit embracing the district."

STATEMENT

The instant dispute involves two separate cases, both of which arise from truck fires involving General Motors ("GM") trucks. Plaintiffs in both actions seek to recover damages for injuries received in these fires. The Camerons filed suit against GM in the United States District Court of South Carolina. *Cameron v. General Motors Corp.*, Civil Action No. 6:93-1278-3 (D.S.C.). The second suit was filed by Laura G. Bishop, as the personal representative of Shawn D. Bishop, in the United States District Court for the Eastern District of Oklahoma.

Bishop v. General Motors Corp., Civil Action No. 94-286-S (E.D. Okla.). The law firm of Butler, Wooten, Overby & Cheeley of Columbus and Atlanta, Georgia, represented the plaintiffs in both actions.[2]

Plaintiffs in both *Cameron* and *Bishop* sought certain discovery from GM, which GM resisted by asserting claims of attorney-client privilege. In an effort to avoid unnecessary relitigation of discovery issues in both the *Bishop* and *Cameron* cases, all parties entered into a stipulation in *Bishop*, under which rulings on discovery issues by the District Court in *Cameron* would become binding on the parties in *Bishop*. The transcript of the proceedings at which this stipulation was reached is reproduced in pertinent part in Appendix D.

On November 7, 1994, the District Court of South Carolina entered an order in *Cameron* sustaining GM's privilege plea as to some documents and overruling it as to others. GM produced all but two of these documents. As to the two documents not produced, GM filed a petition for a writ of mandamus to the Fourth Circuit on November 10, 1995, and asked the court of appeals to direct the District Court to sustain GM's privilege plea. Simultaneously, GM moved the court of appeals to stay the District Court's order pending resolution of the petition for writ of mandamus. The Fourth Circuit granted the motion for a stay on November 14, 1994.

The parties settled *Cameron* on December 16, 1994. By letter dated December 19, 1994, counsel for the Camerons advised the court of appeals of the settlement. On the same day, James E. Butler, Jr., counsel for plaintiffs in both *Cameron* and *Bishop*, wrote to the court in Oklahoma, stating in pertinent part:

> [T]he *Cameron* case has settled. GM had declined to produce two documents with respect to which Judge

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[2] Butler, Wooten, Overby & Cheeley has changed its name to Butler, Wooten, Overby, Cheeley, Pearson & Fryhofer.

> Haden had overruled its privilege objections, *and had filed a Petition for Mandamus with the United States Court of Appeals for the Fourth Circuit. That petition is now moot.* Pursuant to the stipulations that a ruling in *Cameron* constitutes a ruling in *Bishop*, which means that the November ruling applies in *Bishop*, we ask that the Court order GM to produce, to plaintiffs, the two documents which have thus far been withheld. *(GM may then petition for mandamus to the Tenth Circuit, if it so chooses.)*

App. E at E-5 (emphasis added).[3]

On December 28, 1994, GM moved the Fourth Circuit for partial vacatur of the District Court's order as it related to the two specific documents for which GM had requested the writ of mandamus. The court of appeals granted GM's motion on February 17, 1995. By order dated March 15, 1995, the Fourth Circuit denied the Camerons' request for a rehearing.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court of Appeals Directly Conflicts With a Decision of this Court.

To resolve a split among the circuits, this Court addressed last term the propriety of ordering the vacatur of district court orders on appeal after the appeal is rendered moot through settlement. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, ___ U.S. ___, 115 S.Ct 386 (1994). In a unanimous opinion, this Court held that

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[3] As discussed below, the Fourth Circuit criticized Mr. Butler for not advising the Oklahoma court that it had stayed the South Carolina order during the pendency of the mooted appeal. GM, however, immediately responded to this letter. That response is sealed pursuant to an order of the Oklahoma district court. Consequently, GM's letter to the Oklahoma court is not attached to this Petition.

> [w]here mootness results from settlement . . . the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim to the equitable remedy of vacatur.

Id. at 392. The Court concluded,

> mootness by reason of settlement does not justify vacatur of a judgment under review. This is not to say that vacatur can never be granted when mootness is produced in that fashion. As we have described, the determination is an equitable one, and *exceptional circumstances may conceivably* counsel in favor of such a course.

(emphasis added).

In *Bancorp*, the Court did not elaborate on the nature of "exceptional circumstances" that would justify a deviation from the general rule and permit vacatur. On the other hand, in deciding that vacatur should not be granted in most cases, this Court systematically considered and rejected at least three circumstances that *did not* support vacatur. In this case, although the Fourth Circuit wrapped its decision to order vacatur in the language of "exceptional circumstances," the circumstances it cites are the very circumstances this Court considered and rejected in *Bancorp*.

First, under the guise of an "exceptional circumstance," the Fourth Circuit based its order of vacatur on a review of the merits of the District Court's order. The court of appeals conducted an "independent *in camera* review of the documents and the record before us" and held that "[t]he district court, therefore, was in error in ordering the production of these documents." App. A at A-3. This action is patently inconsistent with the decision in *Bancorp*, where this Court emphasized that it was "inappropriate . . . to vacate mooted cases, in which we have no constitu-

tional power to decide the merits, on the basis of assumptions about the merits." *Bancorp*, 115 S. Ct. at 392-93. The Court reiterated this point later in its decision: "We again assert the inappropriateness of disposing of cases, whose merits are beyond judicial power to consider, on the basis of judicial estimates regarding their merits." *Id.* at 393. The Fourth Circuit's order, therefore, is directly contrary to the *Bancorp* decision.

The second factor considered by the Fourth Circuit was the intention of the parties with respect to vacatur. The Court in *Bancorp*, however, explained at length that the parties' desire for vacatur was irrelevant. To be sure, this Court made clear that "those exceptional circumstances do *not* include the mere fact that the settlement agreement provides for vacatur." *Id.* (emphasis added).

The Fourth Circuit ignored this holding in *Bancorp* when it stressed its unsupported belief that the parties intended by their settlement that vacatur be ordered.

> [I]t is inconceivable that the parties ever intended to have a discovery order which was stayed in *Cameron survive* a settlement and surface as binding in *Bishop* without a ruling by this court on General Motors' attack on the very part of the discovery order at issue.

App. A at A-3. (emphasis in original). No party has claimed they agreed to vacatur, and the Fourth Circuit's statement is pure speculation. Irrespective of whether the court of appeals was correct in this belief, this consideration is impermissible. Even had the parties in Cameron expressly stated their desire for vacatur in the settlement agreement, it would have been ineffective under *Bancorp*.

The final factor identified by the court of appeals as an "extraordinary circumstance" similarly is contrary to *Bancorp*'s express holding. This Court determined in *Bancorp* that the "public interest" is best served by denying vacatur post settle-

ment. "Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur." *Bancorp*, 115 S.Ct. at 392 (citing *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.*, 510 U.S. ___, ___, 114 S.Ct. 425, 428 (1993) (Stevens, J., dissenting)). This holding rests on the "special concern that institutional litigants should not be allowed to buy the way out of precedent or preclusion on terms that may accord full relief, or even more, to the party that prevailed in the district court." Wright, Miller & Cooper, *Federal Practice & Procedure: Jurisdiction 2d* § 3533.10 (1995 Supplement).

Contrary to this Court's determination in *Bancorp*, the Fourth Circuit justified its action because it wanted to defeat the precedential value of the District Court's decision. The Fourth Circuit found "exceptional circumstances" to justify vacatur because the District Court's decision *might* "surface as binding in *Bishop*." App. A at A-3. This possibility, however, is the exact reason this Court held that a court of appeals could *not* order vacatur.

According to this Court in *Bancorp*, the *public* interest demands that the Oklahoma district court, or any court, have the benefit of whatever precedential value it might assign to the South Carolina district court's order. The Fourth Circuit's vacatur limits the preclusive effect of the judgment, and denies everyone the benefit of the District Court's extensive analysis and ultimate decision.[4]

In conclusion, the "extraordinary circumstances" justifying vacatur simply cannot be the very same circumstances that this Court has held do *not* justify vacatur. As this Court has reprimanded the Fourth Circuit in the past, "unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no

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[4] The District Court of South Carolina's order is a 22 page analysis of the attorney-client privilege.

matter how misguided the judges of those courts may think it to be." *Hutto v. Davis*, 454 U.S. 370, 373, 102 S.Ct. 703, 705 (1982). Any uncertainty as to the circumstances warranting vacatur — at least the circumstances relied upon by the Fourth Circuit — was resolved in *Bancorp*, and the Fourth Circuit must abide by this Court's resolution of those issues.

II. The Court of Appeals' Order Affecting the Discretion of a District Court in Another Circuit Conflicts with Decisions in Other Circuits and Prior Decisions of the Fourth Circuit.

In *Cameron*, the Fourth Circuit's decision to affect a district court case pending in another circuit directly conflicts with decisions in other circuits and prior case law in the Fourth Circuit. The Fourth Circuit vacated the South Carolina District Court's decision specifically to prevent the judgment from having any effect in *Bishop*, now pending in the District Court in Oklahoma. App. A at A-3. This decision conflicts with numerous decisions in other circuits which declined to take actions having collateral impact on orders entered by district courts in another circuit.

By statute, the jurisdiction of courts of appeals is limited by geography. 28 U.S.C. § 1294 provides,

> Appeals from reviewable decisions of district and territorial courts shall be taken to the courts of appeals as follows: (1) From a district court of the United States to the court of appeals for the circuit *embracing* the district.

(emphasis added). It is well settled that courts of appeals have no jurisdiction to review decisions of district courts outside of the geographical bounds of their circuit. *See, e.g., Roofing & Sheet Metal Serv. v. La Quinta Motor Inns*, 689 F.2d 982, 986 (11th Cir. 1982); *McGeorge v. Continental Airlines, Inc.*, 871 F.2d 952, 955 (10th Cir. 1989); *Linnell v. Sloan*, 636 F.2d 65

(4th Cir. 1980); *Preston Corporation v. Raese*, 335 F.2d 827 (4th Cir. 1964).[5] This limitation extends to the issuance of orders, such as a writ of mandamus to district courts outside of the circuit. *General Electric Co. v. Byrne*, 611 F.2d 670 (1979); *C.P.C. v. Nosco Plastics, Inc.*, 719 F.2d 400 (1983).

Following these fundamental principles, the Eighth Circuit refrained from exercising jurisdiction in *Reisinger v. U.S.*, 518 F.2d 57 (8th Cir. 1975), because it had no jurisdiction. In that case, which involved the same parties litigating in two districts, the Iowa district court found that the parties, by stipulation, were bound by the finding of liability made by the district court in Colorado. An appeal was taken from the Colorado district court's judgment on that issue. While the matter was pending, the parties filed a collateral appeal of the decision of the Iowa court. The Eighth Circuit held in abeyance the appeal from the Iowa district court on the ground that it "had no power to review the findings of the District Court of Colorado." *Id.* at 58.

Similarly, in a case involving alleged defamatory comments in a footnote of a district court opinion, the Third Circuit in *Lowenschuss v. West Publishing Co.*, 542 F.2d 180 (3rd Cir. 1976), held that it could not interfere with the opinion of a district court in the Second Circuit, "even to the extent of ordering a separate addendum to a footnote" to the district court's decision. *Id.* at 183. While the Third Circuit ultimately decided this case on other grounds, it noted,

> we are constrained to observe that an order elaborating on an official opinion of a court of another circuit, such as is sought here, is undesirable on policy grounds alone as an unwarranted intrusion on the internal affairs of a co-equal, sister circuit.

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[5] The exception to the limitation of the jurisdiction of the courts of appeals by geography is multi-district jurisdiction, provided under 28 U.S.C. § 1407(c), which is not applicable here.

Id. at 183-4.

Contrary to its statutory constraints, the holdings in other circuits, and its own prior decisions, the Fourth Circuit's ruling in this case improperly reached beyond its jurisdictional boundaries. As discussed above, the Fourth Circuit vacated the District Court's decision denying GM's claim of privilege to prevent its potential binding effect in the *Bishop* case in the Oklahoma district court. The controlling stipulation by which the rulings in *Cameron* would be binding in *Bishop* was made in Oklahoma, not South Carolina. Thus, whether that stipulation requires GM to produce the documents in question is a matter for the district court judge in Oklahoma to decide.[6] *If* the district court judge in *Bishop* decides to enforce GM's compliance with this order, *then*, GM may seek relief in the Tenth Circuit. The Fourth Circuit does not have jurisdiction to affect the decision of a district court in the Tenth Circuit. Its effort to do so is plain error.

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[6] As decribed above in footnote 3, the court of appeals also expressed its concern that the Oklahoma court may have been misled by the Bishops' counsel's failure to state in his letter that the order in *Cameron* was stayed pending appeal. Whatever the significance a stay pending appeal in a moot appeal may have, that surely was for the Oklahoma district court to decide.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be granted. We request this Court summarily reverse the judgment below.

Respectfully submitted,

Henry E. Hudson
Counsel of Record
James S. Crockett, Jr.
Claudia T. Salomon
Mays & Valentine
1111 E. Main Street
P. O. Box 1122
Richmond, Virginia 23208-1122
(804) 697-1200

Counsel for Petitioners

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Case No. 94-2435

FILED: February 17, 1995

In re: General Motors Corporation,

Petitioner

ORDER

Pending before the court are General Motors' petition for writ of mandamus, filed November 11, 1994, and General Motors' motion for partial vacatur of the district court's order of November 7, 1994, filed December 28, 1994. The petition for writ of mandamus and the motion for partial vacatur seek the same relief: vacatur of that portion of Judge Haden's order in *Cameron v. General Motors Corp.*, CA Nos. 3-93-1278, 3-93-1279, 3-93-1280 (D.S.C), ordering General Motors to produce to plaintiffs *In Camera* Document Numbers 33 and 233. For the reasons that follow, General Motors' motion for partial vacatur of Judge Haden's order of November 7, 1994 is granted.[1]

On November 7, 1994, Judge Haden in *Cameron* ordered General Motors to produce, *inter alia*, two documents *In Camera* Document Numbers 33 and 233 (as redacted by the district court), to the plaintiffs. On November 10, 1994, General Motors petitioned this court to issue a writ of mandamus directing Judge Haden to vacate that portion of his November 7, 1994 order

[1] Because we are of the opinion that General Motors' motion for partial vacatur of Judge Haden's November 7, 1994 order should be granted, General Motors' petition for writ of mandamus is dismissed as moot.

requiring the production of *In Camera* Document Numbers 33 and 233. On November 14, 1994, this Court stayed Judge Haden's order insofar as it required the production of *In Camera* Document Numbers 33 and 233, stating that "the period within which General Motors is compelled to produce these [documents] is stayed until the hearing by the panel . . . and the Court has entered its order herein." *In re: ; General Motors*, No. 94-2436 (4th Cir. November 14, 1994 Order). On November 18, 1994, we held a hearing on General Motors' petition for writ of mandamus.

On December 16, 1994, General Motors and the plaintiffs in *Cameron* reached a settlement. On December 19, 1994, counsel for the plaintiffs in *Cameron*, James E. Butler, Jr., sent a letter to Judge Burrage, a United States district judge in Oklahoma presiding in another case (*Bishop v. General Motors Corp.*) in which Mr. Butler represents plaintiffs suing General Motors. In that letter, Mr. Butler represents that, pursuant to a stipulation,[2] Judge Haden's order of November 7, 1994 requires that *In Camera* Documents 33 and 233 be produced in *Bishop*.[3]

On December 28, 1994, General Motors filed a motion for partial vacatur of Judge Haden's November 7, 1994 order. In its motion, General Motors asks this court, in the event we find the petition for writ of mandamus moot as a result of the *Cameron* settlement, to vacate Judge Haden's November 7, 1994 order as it relates to the production of *In Camera* Document Numbers 33 and 233.

In *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386 (1994), the Supreme Court held that, absent

[2] The parties stipulated that a ruling in the *Cameron* case was binding in *Bishop* and that a ruling in *Bishop* was binding in *Cameron*.

[3] We find it surprising, and very disturbing, that Mr. Butler did not state in this letter that Judge Haden's November 7, 1994 order as it related to In Camera Document Numbers 33 and 233 was stayed by order of this court.

exceptional circumstances, "mootness by reason of settlement does not justify vacatur of a judgment under review." *Id.* at 393. The Court did not explain what circumstances constitute "exceptional circumstances" so as to avoid the application of the rule against vacatur of judgments when the parties reach a settlement. Whatever the parameters of the exceptional circumstances exception are, this case squarely falls within that exception. First, what is at issue here is a claim of privilege, a matter that should not be taken lightly. Second, based upon our independent *in camera* review of the documents and the record before us, it is clear that *In Camera* Document 33 is not discoverable because of attorney-client privilege and *In Camera* Document Number 233 (either in its full or redacted form) is not discoverable because of attorney-client and work-product privileges. *See* Fed. R. Civ. P. 26(b). The district court, therefore, was in error in ordering the production of these documents. Third, it appears Mr. Butler, counsel for the plaintiffs in *Cameron* and *Bishop*, has not been entirely candid with Judge Burrage in his communications with that court, as he proffered to that court that, pursuant to the parties' stipulation, Judge Haden's order of November 7 compelled the production of *In Camera* Documents 33 and 233, despite the fact that Judge Haden's order of November 7, 1994 as it related to *In Camera* Document Numbers 33 and 233 was stayed on November 14, 1994 by this court. Fourth, while this court favors stipulations of the type entered into by General Motors and the plaintiffs in *Cameron* and *Bishop*, which conserve precious judicial time and resources, it is inconceivable that the parties ever intended to have a discovery order which was stayed in *Cameron survive* a settlement and surface as binding in *Bishop* without a ruling by this court on General Motors' attack on the very part of the discovery order at issue. Under these circumstances, we exercise our discretion under 28 U.S.C. § 2106 and ORDER that portion of Judge Haden's order of November 7, 1994 ordering

the production of *In Camera* Document Numbers 33 and 233 be, and hereby the same is, VACATED.

Entered with the consent and approval of Judge Donald Russell and Judge Karen J. Williams.

/s/ Clyde H. Hamilton
Clyde H. Hamilton
United States Circuit Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

CIVIL ACTION NOS. 3:93-1278-07
3:93-1279-07
3:93-1280-07

MARK D. CAMERON, et al.,

Plaintiffs,

v.

GENERAL MOTORS CORPORATION,

Defendant.

MEMORANDUM OPINION AND ORDER

Pending are Plaintiffs' motions to reinstate certain discovery orders vacated by the Honorable G. Ross Anderson, Jr., District Judge, prior to his recusal from this matter. Plaintiffs seek discovery of certain documents for which Defendant has asserted attorney-client and/or work product privileges. The documents are included in two groups: (1) Legal files; and (2) the Elwell documents. Judge Anderson found certain documents within those files to be unprivileged. This Court, *de novo*, has undertaken an *in camera* review of those documents and no others.

At the outset, it may be appropriate to enunciate the considerations and standards the Court has employed in its review of the documents in question. The Court reviews the appropriate considerations and standards for application of the attorney-client and work product privileges in turn.

I.

ATTORNEY-CLIENT PRIVILEGE

The United States Supreme Court has discussed generally the attorney-client privilege:

> "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence § 2290 (Mcnaghten rev. 1961). Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client. . . 'The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out.' *[Trarnmel v. United States*, 445 U.S. 40, 51, 100 S.Ct. 906, 913, 63 L.Ed.2d 186 (1980)]. . . . the purpose of the privilege [is] 'to encourage clients to make full disclosure to their attorneys.' *[Fisher* v. *United States,* 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976)]." *Upjohn Co.* v. *United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584 (1981).

The attorney-client privilege applies to corporate clients. *Upjohn Co. v. United States, supra*, 449 U.S. at 390, 101 S.Ct. at 683, 66 L.Ed.2d at 591, *citing, United States v. Louisville & Nashville R. Co.*, 236 U.S. 318, 336, 35 S.Ct. 363, 369, 59 L.Ed. 598 (1915).

The onus of demonstrating the applicability of attorney-client privilege falls upon the party asserting the privilege. *United*

States v. Jones, 696 F.2d 1069, 1072 (4th Cir. 1982). *Accord, Sheet Metal Workers Int. Ass'n v. Sweeney*, 29 F.3d 120, 125 (4th Cir. 1994); *United States v. Tedder*, 801 F.2d 1437, 1441 (4th Cir. 1986), *cert. denied*, 480 U.S. 938, 107 S.Ct. 1585, 94 L.Ed.2d 775 (1987); *United States v. (Under Seal)*, 748 F.2d 871, 876 (4th Cir. 1984); *Darnell v. McMurray*, 141 F.R.D. 433, 434 (W.D.Va. 1992); *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 116 F.R.D. 46, 50 (M.D.N.C. 1987). The party asserting the attorney-client privilege "must establish not only that the attorney-client relationship existed, but also that the particular communications at issue are privileged and that the privilege was not waived." *United States v. Jones, supra*, 696 F.2d at 1072. "In practical terms, this burden requires the proponent to explain, through *ex parte* submissions if necessary to maintain confidentiality, the significance or meaning of an otherwise cryptic document." *United States v. (Under Seal), supra,* 748 F.2d at 876.[1]

When a court scrutinizes a particular communication to determine whether it is protected by attorney-client privilege, the test applied in this Circuit is the widely cited four-step examination outlined in *United States v. United Shoe Machinery Corp.*, 89 F.Supp. 357, 358-59 (D.Mass. 1950). As stated in *United States v. Jones, supra*, 696 F.2d at 1072:

> "The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) and in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the

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1 A substantial number of documents submitted as privileged by the Defendant fall within the "cryptic" category.

> purpose of securing primarily either (i) an opinion on law, or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client."

Accord, United States v. Tedder, supra, 801 F.2d at 1441-42[2]; *In re Grand Jury Proceedings,* 727 F.2d 1352, 1355 (4th Cir. 1984); *N.L.R.B. v. Harvey,* 349 F.2d 900, 907 (4th Cir. 1965); *Henson v. Wyeth Laboratories, Inc.*, 118 F.R.D. 584, 587 (W.D.Va. 1987); *In re Grand Jury Investigation*, 640 F.Supp. 1047, 1050 (S.D.W.Va. 1986) (Haden, C.J.).

The attorney-client privilege applies not only to communications from the lawyer to the client, but also extends "to protect communications by the lawyer to his client, agents, or superiors, or to other lawyers in the case of joint representation, if those communications reveal *confidential* client communications." (emphasis added). *United States v. (Under Seal), supra,* 748 F.2d at 874.[3] Not all communications between the aforemen-

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[2] In *Tedder, supra,* 801 F.2d at 1441, the Court of Appeals also cited to the test outlined in 8 Wigmore, *Evidence* § 2292 (Mcnaghten rev. 1981):

> "Wigmore holds the privilege to exist: '(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived."'

[3] In *United States v. (Under Seal), supra,* 748 F.2d at 874, n.5, the Court cited with approval Supreme Court Standard 503(b), stating it "provides a comprehensive guide to the federal common law of attorney-client privilege." Standard 503(b) states:

> "A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself and his representative and his lawyer

tioned parties, however, are privileged. Only those deemed "confidential" may be protected from discovery. As described by the Court of Appeals, "confidential" communications are those "not intended to be disclosed to third persons other than in the course of rendering legal services to the client or transmitting the communications by reasonably necessary means." *United States v. (Under Seal), supra,* 748 F.2d at 874, *citing* Supreme Court Standard 503(a) (4) ("A communication is 'confidential' if not intended to be disclosed to third persons other than those to whom disclosure is in the furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication."). The Court of Appeals in *United States v. (Under Seal), supra,* 748 F.2d at 875, stated:

"'[T]he "essence" of the privilege is the protection of what was "expressly made confidential" or should have been "reasonably assume[d] . . . by the attorney as so intended." In determining whether it was to be reasonably assume[d] that confidentiality was intended," "it is the unquestioned rule that the mere relationship of attorney-client does not warrant a presumption of *confidentiality.*'"

Quoting, In re Grand Jury Proceedings, supra, 727 F.2d 1352, 1356, *quoting, United States v. Jones, supra.*

The privilege does not extend to documents or communications relating to matters the client reveals or intends to reveal to others. *United States v. (Under Seal), supra,* 748 F.2d at 875, *citing In re Grand Jury Proceedings, supra,* 727 F.2d at 1356. *Accord, Glaxo, Inc. v. Novopharm, Ltd.,* 148 F.R.D. 535, 538 (E.D.N.C. 1993); *Winchester Capitol Management Co., Inc. v. Manufacturers Hanover Trust Co.,* 144 F.R.D. 170, 174

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and his lawyer's representative, or (2) between his lawyer and his lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client, or (5) between lawyers representing the client."

(D.Mass. 1992); *Gottlieb v. Wiles*, 143 F.R.D. 241, 249 (D. Colo. 1992); *Western Trails, Inc. v. Camp Coast to Coast, Inc.*, 139 F.R.D. 4, 13-14 (D.D.C. 1991); *In re Air Crash Disaster at Sioux City, Iowa on July 19, 1989*, 133 F.R.D. 515, 518 (N.D.Ill. 1990). Where a communication contains both non-confidential and confidential information, the court must remove, or redact the confidential information from the communication before releasing it to the adverse party. *United States v. (Under Seal), supra,* 748 F.2d at 875, n.7.

The privilege of a party to withhold otherwise discoverable materials cuts across the grain of traditional notions of discovery as a tool to bring all relevant facts to the light of day. *United States v. (Under Seal), supra*, 748 F.2d at 875 ("Although the [attorney-client] privilege has a venerable pedigree and helps to ensure competent and complete legal services, it is nonetheless inconsistent with the general duty to disclose and impedes the investigation of the truth."); *In re Grand Jury Proceedings, supra*, 727 F.2d at 1355 ("[The attorney-client] privilege . . . is 'in derogation of the public's "right to every man's evidence[.]" ' "*Quoting, In re Horowitz*, 482 F.2d 72, 81 (2nd Cir.), *cert. denied*, 414 U.S. 867, 94 S.Ct. 64, 38 L.Ed.2d 86 (1973)); *N.L.R.B. v. Harvey, supra*, 349 F.2d at 907. *See* Rule 26(b)(1) of the *Federal Rules of Civil Procedure* ("[Generally,] [p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."[4]).

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[4] Thus, it is important for the parties to note the distinction between information *discoverable* and information *admissible* at trial. Simply be-

Because the attorney-client privilege is an exception from the otherwise liberal construction of discovery rules, *Hickman v. Taylor*, 329 U.S. 495, 507, 67 S.Ct. 385, 392, 91 L.Ed. 451 (1947) ("[D]iscovery rules are to be accorded a broad and liberal treatment."), its use is not favored by federal courts. *United States v. Oloyede*, 982 F.2d 133, 141 (4th Cir. 1992), *quoting, Herbert v. Lando*, 441 U.S. 153, 175, 99 S.Ct. 1635, 1648, 60 L.Ed.2d 115 (1979); *In re Grand Jury Proceedings, supra*, 727 F.2d at 1355. Therefore, assertions of attorney-client privilege are "to be ' " strictly confined within the narrowest possible limits consistent with the logic of its principle." ' " *In re Grand Jury Proceedings, supra*, 727 F.2d at 1355, *quoting, In re Grand Jury Investigation*, 599 F.2d 1224, 1235 (3rd Cir. 1979). *See United States v. Oloyede, supra*, 982 F.2d at 141; *Grand Jury Proceedings Under Seal v. United States*, 947 F.2d 1188, 1190 (4th Cir. 1991) ("[T]he [attorney-client] privilege must be strictly construed."); *United States v. Tedder, supra*, 801 F.2d at 1441; *N.L.R.B. v. Harvey, supra*, 349 F.2d at 906, *quoting, Hatton v. Robinson*, 31 Mass. (14 Pick.) 416, 422 (1833) ("'[T]he privilege of exemption from testifying to facts actually known to the witness, is in contravention to the general rule of law; it is therefore to be watched with some strictness, and is not to be extended beyond the limits of that principle of policy, upon which it is allowed[.]' "); *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc., supra*, 116 F.R.D. at 49 ("Notwithstanding its ancient roots and modern necessity, the privilege must be strictly construed to ensure that it does not unduly impinge on the more general, overriding duty of insisting that investigations and decisions be based on truth and reality as opposed to fiction or fabrication.").

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cause a document is discoverable does not make it admissible at trial; conversely, merely because a document will not be admissible at trial does not make it privileged or undiscoverable.

II.

WORK PRODUCT PRIVILEGE

While application of the attorney-client privilege is the creation of federal common law, the application of the work product privilege was created and is governed by Rule 26(b)(3) of the *Federal Rules of Civil Procedure.* Rule 26(b) (3) states, in pertinent part:

> **"Trial Preparation: Materials.** Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

The rationale behind Rule 26(b) (3) was stated in the seminal Supreme Court case addressing the work-product privilege, *Hickman v. Taylor*, 329 U.S. at 511, 67 S.Ct. at 393-94, 91 L.Ed. at ___ (1947):

> "Proper preparation of a client's case demands [a lawyer] assemble information, sift whatever he considers to be the relevant from the irrelevant facts,

> prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their client's interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly . . . termed . . . 'Work product of the lawyer.' Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served."

Clearly, "the work-product doctrine is distinct from and broader than the attorney-client privilege." *United States v. Nobles*, 422 U.S. 225, 239, 95 S.Ct. 2160, 2170, 45 L.Ed.2d 141 (1975)[5]. With that backdrop, the Court explicitly stated in *Hickman, supra,* 329 U.S. at 511-12, 67 S.Ct. at 394, 91 L.Ed. at ___, that

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[5] In *Nobles, supra,* 422 U.S. at 238-39, 95 S.Ct. at 2170, 45 L.Ed.2d at 154, the Court reiterated the rationale behind the work product privilege, and extended its application to documents prepared by agents of attorneys:

> "At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case. But the doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself."

the work product privilege was not absolute; nonetheless, the Court failed to provide more than a general analysis of when the privilege may be breached:

> "We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. And production might be justified where the witnesses are no longer available or can be reached only with difficulty. Were production of written statements and documents to be precluded under such circumstances, the liberal ideals of the deposition-discovery portions of the Federal Rules of Civil Procedure would be stripped of much of their meaning."

Accord, United States v. Nobles, supra, 422 U.S. at 239, 95 S.Ct. at 2170, 45 L.Ed.2d at 154 ("The privilege derived from the work-product doctrine is not absolute. Like other qualified privileges, it may be waived."). The Court thereafter placed the burden of justification for abrogating the privilege on the party seeking the document:

> "[T]he general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a sub-

> poena or court order. That burden, we believe, is necessarily implicit in the rules as now constituted." *Hickman,* 329 U.S. at 512, 67 S.Ct. at 394, 91 L.Ed. at ___.

In this Circuit, the work product of a lawyer or his agent is divided into two types: (1) opinion work product and (2) non-opinion work product. Although the former enjoys absolute immunity, the latter is protected only by qualified immunity. As stated by our Court of Appeals in *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Murray Sheet Metal Co., Inc.*, 967 F.2d 980, 984 (1992):

> "[W]ork product [is divided] into two parts, one of which is 'absolutely' immune from discovery and the other only qualifiedly immune. As a philosophical extension of the attorney-client privilege. . . the pure work product of an attorney insofar as it involves 'mental impressions, conclusions, opinions or legal theories . . . concerning the litigation' is immune to the same extent as an attorney-client communication. *Cf. Duplan [Corp. v. Moulinage et Retorderie], 509 F.2d [730,] 735-36 [(4th Cir. 1974), cert. denied,* 420 U.S. 997, 95 S.Ct. 1438, 43 L.Ed.2d 680 (1975)]. This is so whether the material was actually prepared by the attorney or by another 'representative' of the party. Fed.R.Civ.P. 26(b) (3). All other documents and tangible things prepared in anticipation of litigation or for trial may be discovered, but only on a showing of 'substantial need.' Thus in resolving the question of whether matters are immune from discovery because of a work product rule, attention must be turned first to whether the documents or tangible things were prepared in anticipation of litigation or for trial and then, for materials other than legal opinion

> or theory, to whether the requesting party has demonstrated a substantial need." (footnotes omitted).

Not all documents prepared by a defendant which later may be used in litigation are protected by the work product privilege. The Court of Appeals has recognized a party often may undertake investigations for multiple purposes, "not only out of a concern for future litigation, but also to prevent reoccurrences, to improve safety and efficiency . . . and to respond to-regulatory agencies. *Determining the driving force behind the preparation of each requested document is therefore required in resolving a work product immunity question.*" (emphasis added). *National Union Fire Ins. Co. of Pittsburgh, Pa., supra*, 967 F.2d at 984. *See Allendale Mut. Ins. Co. v. Bull Data Systems, Inc.*, 152 F.R.D. 132, 136 (N.D.Ill. 1993) ("[T]he anticipation of future litigation must have been the primary motivation which led to the creation of the documents. . . . Documents which do not refer to work product prepared by an attorney or other agent of a party to aid in forthcoming litigation, and which were generated in the ordinary course of business, are discoverable."); *Janicker v. George Washington University*, 94 F.R.D. 648, 650 (D.D.C. 1982) (To fall within the protection of the privilege, "the primary motivating purpose behind the creation of a document or investigative report must be to aid in possible future litigation."). The foregoing emphasizes the problematic situation arising when a party's documentation reflects concerns for both safety about the product or workplace in issue *and* potential litigation. As a practical matter, a company seeking to avoid potential litigation over an unsafe product or workplace will use internal investigations for both purposes simultaneously.[6] De-

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[6] The Court of Appeals also instructs that a "driving force" of internal documentation may be the desire to prevent "reoccurrences." *National Union Fire Ins. Co. of Pittsburgh, Pa., supra*, 967 F.2d at 984. Where the "driving force" generating the documentation is the desire to prevent "reoccurrences," rather than potential litigation, the adverse party may discover the document. Difficulty of evaluation of such documents results, however,

ciphering the "driving force"[7] behind the documentation of such investigations may be difficult indeed.[8]

The Court of Appeals has provided guidance to trial courts by instructing as follows: "The document must be prepared *because* of the prospect of litigation when the preparer faces an actual claim or a potential claim following an actual event or series of events that reasonably could result in litigation." (emphasis in original). *National Union Fire Ins. Co. of Pittsburgh, Pa., supra*, 967 F.2d at 984. Many of the documents in the case at bar to which Defendant claims work product privilege do not disclose, either in the document or from any other source, the actual or potential claim or the actual event or series of events that generated the documents were prepared. For many documents, Defendant merely asserts they were prepared in anticipation of potential litigation. Under *National Union Fire Ins. Co. of Pittsburgh, Pa., supra*, such an insufficient description may fail to satisfy the standard for making an initial showing of work product privilege.

Where a party has made an initial showing of work product privilege protection, the adverse party yet may be entitled to otherwise privileged non-opinion work product documents.[9] An adverse party, however, may discover non-opinion documents

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because the desire to prevent "reoccurrences" is often linked intimately to "potential litigation"; and because a major reason many companies seek to prevent "reoccurrences" is to avoid potential litigation.

[7] *National Union Fire Ins. Co. of Pittsburgh, Pa., supra*, 967 F.2d at 98 [sic].

[8] The Court notes a substantial number of documents for which Defendant has asserted work product privilege appear to have been prepared for both potential litigation *and* to improve safety, efficiency and to prevent reoccurrences. *National Union Fire Ins. Co. of Pittsburgh, Pa., supra*, 967 F.2d at 984. *See Part III, infra.*

[9] Opinion work product is absolutely protected. *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Murray Sheet Metal Co., Inc., supra*, 967 F.2d at 984.

only upon a showing of substantial need. Placing the burden of making a showing of substantial need on the party challenging the document ensures the challenging party will undertake its own investigations and research:

> "The documents falling within this classification are clothed with a qualified immunity that is grounded in the propriety aspect of the work. The immunity for this class of documents is little more than an 'anti-freeloader' rule designed to prohibit one adverse party from riding to court on the enterprise of the other." *National Union Fire Ins. Co. of Pittsburgh, Pa., supra*, 967 F.2d at 985.

Although the foregoing standards appear straightforward, difficulty of application occurs when contested documents contain both opinion and non-opinion work product for which the adverse party has made the requisite showing of substantial need. It would be unfair to protect entire documents from disclosure merely because an attorney has attached an opinion to non-opinion details for which an adverse party substantially needs and cannot discover from other sources. The Fourth Circuit has addressed the foregoing situation in an equitable fashion, stating: "If opinions and theories about the litigation are only part of the document otherwise discoverable, the court may require production of a redacted copy." *National Union Fire Ins. Co. of Pittsburgh, Pa., supra*, 967 F.2d at 985. In practice this equitable approach places the burden on the court to determine what portion of a document fall within opinion or non-opinion classification. The line between opinion and non-opinion work product often may be fine

III.

APPLYING THE PRIVILEGE TESTS

A.

THE LEGAL FILES

Bearing in mind the foregoing standards for determining whether particular documents are privileged, and if so, whether the privilege has been breached by conduct, waiver, disclosure or substantial need[10], the Court has undertaken a *de novo in camera* review of the challenged documents. The Court concludes the following Legal Files documents are protected by privilege: *In camera* Document Nos. 26, 224, 216, 119, 118, 120, 225, 28, 142. The Court concludes the following Legal Files documents are not protected by privilege: *In camera* Document Nos. 34, 19 are not covered by attorney-client privilege; both documents constitute non-opinion work product for which substantial need has been shown. For *in camera* Document Nos. 32, 31, 33, 35, 30, 36, the Court concludes the attorney-client privilege does not apply.

In camera Document No. 233 is partially privileged. Plaintiffs have made the requisite showing of substantial need to breach the privilege regarding the non-opinion work product therein incorporated. Therefore, the Court concludes a "redacted copy," per *National Union Fire Ins. Co. of Pittsburgh, Pa., supra*, 967 F.2d at 985 and *United States v. (Under Seal)*,

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[10] The Court concludes all of the contested documents are relevant or "appear reasonably calculated to lead to the discovery of admissible evidence." *Fed.R.Civ.P.* 26(b)(1). Plaintiffs contend they have no other source from which to discover the underlying facts. Defendant has not suggested any of the underlying facts discussed in the documents have been disclosed to Plaintiffs. Nor has Defendant suggested the documents have been available to Plaintiffs through any other source. Therefore, for those non-opinion documents protected only by work product privilege, the Court concludes Plaintiffs have made the requisite showing of substantial need.

supra, 748 F.2d at 875, n.7., shall be made available to the Plaintiffs consistent with the following: the title page is not privileged; the table of contents page is not privileged; page one is privileged; page two is privileged from the top of the page down to the second paragraph beginning, "Edward C. Ivey was interviewed by . . . "— page two is unprivileged from that point through to page three; page three is unprivileged from the beginning of the page through the middle of the page where the sentence concludes " '. . . Olds could spend on fuel systems.' " — from the end of the foregoing sentence through the end of that paragraph is privileged — the remaining balance of page three is not privileged; page four is not privileged from the top of the page through three-quarters of the page ending with the phrase, " ' . . . takes effect in 1977.' "— from that point until the end of the page is privileged; page five is privileged from the beginning of the page until the beginning of the second paragraph, which states: "Document No. 71051 . . . "— the remaining balance of the page is not privileged through the bottom of the page with the phrase ending " . . . has not been located; . . . " — the remaining balance of the page is privileged (footnote 1 is unprivileged from the beginning of the footnote through the end of the phrase " 'as small as possible.' "— the remaining balance of footnote one is privileged); the top two lines on page six are privileged, the remaining balance of the page is not; the remaining balance of the document is not privileged with the exception of the last paragraph on page 17, and all of page 18.

B.

THE ELWELL FILES

As with the Legal Files documents, the Court has undertaken a *de novo* review of the Elwell Files documents *in camera*. The Court concludes the following documents are protected by privilege:

Document Nos.

03213 - 03222
00186 - 00187
03223
11425
05624 - 05639
5690
6233
07266 - 07269
07290 - 07292
07313 - 07326
07656
07657
07658
07659
07660
07661
08185 - 08215
03226
05681 - 05685
05264
05549
04908 - 04909

The Court concludes the following documents are not protected by privilege (the Court is not convinced the "driving force," *National Union Fire Ins. Co. of Pittsburgh, Pa., supra*, 967 F.2d at 984, behind the preparation of these documents was future

litigation; nonetheless, to the extent the documents somehow constitute initially privileged work product, all of the documents constitute non-opinion work product for which the Court concludes Plaintiffs have provided the requisite substantial need for discovery):

Document Nos.

04391
04906 - 04907
04910 - 04912
04956 - 04958
04967 - 04969
05112 - 05113
05691 - 05693
05729 - 05730
05731 - 05748
05917 - 05927
08174 - 08177
08141 - 08143
08144 - 08149, 18151
05132 - 05133
02870 - 02884
02885 - 02899
05756 - 05761
05664 - 05668
05672
05825 - 05827
05831 - 05832
05901
07516

An initial showing of work product privilege has been made for the following documents[11], but the Plaintiff s have demonstrated the requisite substantial need for discovery:

Document Nos.

02183 - 02184
05652 - 05658
05755
05764 - 05771
06232
06234 - 06237
06244
06295
07360 - 07362
07363 - 07365
08082 - 08084
07662
08127 - 08132
08133 - 08140
06068
06089
05669
05551 - 05597
05762 - 05763

The following documents are protected by partial privilege, *National Union Fire Ins. Co. of Pittsburgh, Pa., supra*, 967 F.2d at 985 and *United States v. (Under Seal), supra*, 748 F.2d at 875, n.7, as follows: The last sentence in Document No. 05694 is privileged and shall be redacted (the remaining balance of the document is not privileged); in Document Nos. 06241-06242, all dollar amounts referring to settlement to the right of the prayer column shall be redacted (the remaining balance of the

[11] Defendant asserts attorney-client privilege over several of the listed documents; the Court concludes that privilege is inapplicable to those documents.

documents are not privileged); in Document No. 06243, of the four graphs, only the graph entitled "vehicle fuel-fed fire lawsuits" is not privileged — the remaining balance of the document — shall be redacted; in Document No. 08150, paragraph No. 5 shall be redacted (the remaining balance of the document is not privileged).

Finally, four documents submitted to the Court are illegible. Defendant is **ORDERED** to furnish to the Court by return mail legible copies of the following documents: Document Nos. 10254-10258; 10252-10253; 05828-05830; 05835-05936.

IV.

CONCLUSION

Consistent with the foregoing, Defendant is **ORDERED** to make available to counsel for the Plaintiffs copies of those documents not covered by privilege, in accord with Part III of this Memorandum Opinion, within three days of receipt of this Order. The copies must be fully legible. Plaintiff is not entitled to discover the documents the Court has concluded are covered by privilege. Defendant must also furnish to the Court legible copies of the four documents the Court has been unable to examine due to the poor quality of the copies submitted.

The Clerk is directed to send a copy of this Order to the Honorable Robert S. Carr, United States Magistrate Judge, and to lead counsel of record.

ENTER: November 4, 1994

/s/ Charles H. Haden, II
Charles H. Haden II,
Judge of the United States
District Court for the
District of South Carolina,
sitting by designation

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 94-2435
CA-93-1278-7-3
CA-93-1279-7-3
CA-93-1280-7-3

FILED: March 15, 1995

In Re: GENERAL MOTORS CORPORATION,
a Delaware Corporation,

Petitioner

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The respondents' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/Bert M. Montague
CLERK

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF OKLAHOMA

ROBERT BISHOP and LAURA BISHOP,
as Surviving Parents and
Next of Kin of SHAWN D. BISHOP, Deceased,
Plaintiffs,

vs.

GENERAL MOTORS CORPORATION,
Defendant.

CIVIL ACTION
FILE NO. 94-286-S

EXCERPT OF THE TRANSCRIPT OF PROCEEDINGS

HEARING ON MOTION BEFORE
HONORABLE MICHAEL BURRAGE, JUDGE
SEPTEMBER 28, 1994

APPEARANCES

FOR THE PLAINTIFFS:

MR. JAMES E. BUTLER, JR. and MR. PETER J. DAUGHTERY, Butler, Wooten, Overby & Cheeley, Attorneys at Law, P. O. Box 2766, Columbus, Georgia 31902

* * * * *

FOR THE DEFENDANTS:

MR. KYLE E. DREYER, Harline, Dacus, Dreyer & Kern, Attorneys at Law, 2626 Cole Avenue, Suite 800, Dallas, Texas 75204

MR. JOHN T. HICKEY, Attorney at Law, 200 East Randolph Drive, Chicago, Illinois 60601.

* * * * *

MR. BUTLER: That's correct.

THE COURT: You say he has issued some rulings and you have some rulings from his magistrate both, or are they just —

MR. BUTLER: Yes, sir. Judge Hayden's rulings — he has issued two orders, August 22 and September 24 — no, 22nd. We have got a copy of — we provided Judge Seay with the former ruling and I brought a copy of the latter one here for when we get to that subject.

THE COURT: Well, let me ask you this: Am I understanding everybody to say that to the extent that these issues before this Court have been ruled on by him, that both of you are willing to live with the rulings?

MR. DREYER: That's right, by him or his magistrate. For the Court's benefit, there were two days of — Judge Hayden issued an order and then referred a number of the specific issues that are clearly within the Plaintiff's motion to compel in this case to his magistrate. Two days of hearing were held, I believe, last week on that discovery request before his Master, Judge Carr, who issued rulings, and I have brought the transcript with me of that hearing, on virtually — I would say virtually all of the discovery issues that are pending in the motion to compel in this case. We had two days of hearings on things like data base discovery, two days of hearings on issues related to discovery of information on the regional counsel project, two days of hearings on the discovery that is at the very heart of this matter and I don't see that we need to — I don't really see the need to relitigate that issue and take two days of this Court's time or some other magistrate's time. As Mr. Hickey indicated, what we are interested in is just consistency and for the Court's

benefit, what happened was that Judge Hayden issued an order that related to certain things. Mr. Butler offered to provide you a copy. I think there is a copy that is a matter of record. He issued an order and then we got a letter from Mr. Butler on August the 30th that said in light of Judge Hayden's order, why don't you withdraw all of your objections to our discovery related to the regional counsel project, related to the data base request and a couple of other things. I wrote Mr. Butler back and said, "I think you are taking Mr. Hayden's — or Judge Hayden's order out of context because he didn't rule on those issues. He referred them to his magistrate for ruling on the issues that are related here and I said to Mr. Butler in my response to him that if those issues — we are not about to withdraw the objections here. There hasn't been a ruling in Cameron, there hasn't been a ruling entered by this Court relevant to the objections General Motors made in this Court and the objections General Motors made in the Cameron case. Now, there has been a ruling on those objections because two days of hearings were held with Judge Carr on the discovery issues that were referred by Judge Hayden in the August 22 order and that's what we mean by not having to go through that whole discovery again and go through inconsistent type rulings.

THE COURT: Well, then, there is an order by Judge Hayden and then by Judge Carr? Is that his magistrate?

MR. DREYER: There is an order from Judge Hayden. Yes, Judge Carr is his magistrate. The order has not been reduced to a written order, but all of the topics that are — virtually, I should say, all of the topics covered by Plaintiff's motion to compel covered here were covered in the two days of hearings and rulings were issued from the bench. Then, there was a couple of items that Mr. Butler or Mr. Morrison, General Motors' counsel in that case, said, "Well, we need to brief this and we will submit a brief to you. The judge is going to put that in the form of — and his oral rulings, which are reflected in this

transcript in the form of an order, and we are certainly willing to abide by that with regard to this case because, quite frankly, Judge, they are identical issues. In fact, in large measure, the discovery that was sent was identical in terms of what was asked for in the discovery requests that were brought before Judge Carr in the Cameron case.

MR. BUTLER: Judge, Mr. Dreyer was correct that there were two days of hearings before Judge Carr and that he has entered an order, but he issued a lot of oral rulings from the bench. I don't think we have gotten the transcript from the second day. We have got the transcript from the first day of Judge Carr's hearing, which has those rulings. I have not cross-checked the motion to compel in Cameron with the motion to compel in Bishop and I think, you know, given what they have said, we need to do that.

THE COURT: Well, Mr. Butler, let me ask you this. What I am trying to do is get to the bottom line. With regard to what Judge Carr's rulings were from the bench, is both sides saying that they will live with that?

MR. BUTLER: Yes, sir. If Judge Carr ruled on an issue that is covered by a motion to compel, then — you know, as I said, I haven't compared them but if he ruled on a request or an interrogatory — and he went down them item by item, request by request. If he has ruled on a request or an interrogatory covered by a motion to compel to you, then we will abide by his rulings and you don't need to decide it. That's what I am saying and I gather that's what —

THE COURT: That's what I hear both sides saying.

MR. DREYER: We are willing to have this Court say, "Well, we understand it has been heard by Judge Carr and to the extent that Judge Carr has heard it, I am going to do the same thing that Judge Carr did and address General Motors' objections and overrule them or sustain them in the same way that

Judge Carr did without having to go through the rigmarole. I personally last night until two o'clock in the morning did review the entire transcript of the hearing and I made specific notes and made the comparison between the discovery here and the discovery in that case and I will represent as an officer of the Court that they are virtually identical issues with one or two exceptions.

MR. BUTLER: Your Honor, I am not quite sure what virtually means, but we will make the same comparison and get with them and then you will know which parts of our motion to compel need to be decided. I will point out this: If we are going to have an agreement that both sides are going to abide by the rulings of whatever Court first decides a matter that is pending before more than one Court, which is agreeable to us, then that has a lot of ramifications to this case. It means that Judge Hayden's order about the computer data base search applies to this case. G.M. still objects to that in this case. It means Judge Hayden's Order about the requirement that G.M. provide a privilege log to Plaintiff and to the Court with respect to every document G.M. has withheld from discovery based on privilege claims also applies to this case. G.M. has persistently refused to provide a privilege log in this case. It means that G.M.'s motion for reconsideration with respect to Judge Seay's order that Mr. Elwell can be deposed should be withdrawn, because that issue has been decided by 19 Courts and the score is 17 to 2 against G.M. G.M. is standing here and saying, "We don't want inconsistent rulings. We don't want to relitigate issues that other Courts have already decided. " Well, then, that's fine with us, but they ought to be held to that agreement.

We would also — I have to note — in response to the statement that Judge Hayden's ruling with respect to the emergency motion filed in Cameron is applicable to this case as well, there is a distinction between the two cases. The depositions in Detroit of Mr. Cichowski and Mr. Coffey were noticed by the

Plaintiffs in the Bishop case, taken by the Plaintiffs in the Bishop case. G.M. unilaterally terminated those depositions when I asked the question, quote,"Are you familiar with the term, " close quote, with the term, quote, "fire babies," close quote. If, in fact, G.M. is willing to abide by the rulings in attorney and non-attorney depositions concerning the "fire baby "subject, using that general term, entered by the South Carolina Court or by this Court, either one, then there is no reason for Your Honor to have to hear our emergency motion. Our emergency motion was directed to prevent Mrs. Bishop or her lawyers from having to litigate those issues in Detroit. If those have been litigated in Oklahoma or South Carolina, then the Court doesn't have to decide the emergency motion.

MR. HICKEY: Your Honor, I apologize for this volleying back and forth. We are getting into some serious grounds here and I want to make sure we all understand one another.

What we are willing to agree to do is to avoid taking up this Court's time and effort to relitigating issues that were litigated in South Carolina. We will abide by and live by the rulings in South Carolina on those issues, but we need to make sure for records purposes we are reserving our objections as a matter of record in both cases. I don't think anybody should have a problem with that, but I wanted to make sure that we are not withdrawing our objections.

THE COURT: Well, I suppose each side is —

MR. HICKEY: I am sorry?

THE COURT: I suppose each side is reserving their objections that they had beforehand.

MR. BUTLER: In other words, either side can appeal the decision of the other Court as applied to this case. Right? That's what you are saying?

MR. HICKEY: I don't know what you mean by appeal. I am not talking about interlocutory appeals or anything like that.

MR. BUTLER: I am talking about in this trial—

MR. HICKEY: I am saying we haven't waived any discovery objections.

MR. BUTLER: Right.

MR. HICKEY: If we decided to appeal—

THE COURT: You can object to Judge Hayden's ruling that applied in this case.

MR. BUTLER: Right. We would agree with that.

MR. HICKEY: Now, on the Elwell — you know, that is a different issue. Whether or not they asked for the same discovery and whether or not we have the same issues here as in Cameron, there is a very interesting twist on that. Clearly, to the extent they asked for the same discovery and the same issues are present here as they were in Cameron, I think we have got a meeting of the minds, if you will.

* * * * *

December 19, 1994

Honorable Michael Burrage
U. S. District Court
Eastern District of Oklahoma
Post Office Box 2999
101 North 5th Street, Room 200
Muskogee, OK 74401

VIA FAX NO.: 918-687-2630
AND FEDERAL EXPRESS

RE: *Bishop v. General Motors*

Dear Judge Burrage:

The *Cameron* case settled at approximately 4:45 EST on Friday, December 16, 1994.

Steve and Mark Cameron both survived the wreck and fire which caused them to become substantially disabled. Because of their condition and need, the plaintiffs in the *Cameron* case were desirous of settling that case.

Plaintiff Laura Bishop requests a trial date for her case at the earliest opportunity.

Consistent with the Court's statements about letters from counsel, we have been preparing motions to submit to the Court with respect to matters which, we sincerely believe, require urgent consideration and decision by the Court. However, the pace of events requires that we advise the Court, at this, the earliest opportunity, of the general nature of those matters.

1. Friday, December 16, we started the first of the depositions pursuant to this Court's Order entered December 15—the deposition of GM employee and legal staff lawyer, Maynard Timm. At that deposition, certain testimony was given which we believe pertains to the invocation of the crime-fraud exception to the attorney/client privilege and work product doctrine claims made by GM (hereafter, "privilege claims"). We are

unable to discuss that testimony with the Court, however, as late Thursday afternoon (while I was in Muskogee), our offices received from Kirkland Ellis a faxed copy of an order entered on December 13 by Magistrate Carr in the *Cameron* case, which order expressly prohibits our use of the transcript of the Timm deposition in any case other than *Cameron*, except on motion made to another court and resulting court order.

2. Plaintiffs' counsel had decided to appeal Magistrate Carr's order to Judge Haden. Given the settlement of the *Cameron* case, plaintiffs will instead prepare a motion for this Court's consideration. Magistrate Carr had entered an identical order on request by GM, before we had an opportunity to respond. We complained, he allowed us to respond, and then he re-entered the order as requested by GM. The only copy of that order we have is a faxed copy received from GM counsel at 4:12 p.m. on December 15. That faxed copy is attached. We have not yet been provided with a copy by Magistrate Carr or the clerk's office. The order provides, inter alia, that the videotapes of depositions taken of GM counsel and paralegals may not be used except in the *Cameron* case (though the transcripts can be used in another case, *if* the 'other case' was pending on the date of Magistrate Carr's order, *and if* plaintiffs' counsel in the *Cameron* case are also plaintiffs' counsel in that case, *and* if the other court so orders) (paragraphs 1,15). The Order further directs that neither the transcript or videotape may be shared with other attorneys, excluding, for example, plaintiff's counsel in the *Bishop* case, Messrs. Stout, George, Jackman, and McCormick.[1] Of course, such an order is entirely contrary to the stipulations made by GM in this case—that any ruling made or order entered in either *Bishop* or *Cameron* applies equally to

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[1] That creates a hardship for plaintiff Laura Bishop, as the full services of her Oklahoma counsel are needed to assist in the preparation of motions and arguments regarding the many issues which have arisen in this case.

both. Once again, GM has managed to subvert its solemn stipulations made to this Court.

3. GM's conduct during the Timm deposition makes it clear that little will be gained by continuing depositions pursuant to the Court's December 15 Order unless clear ground rules for the conduct of counsel at such depositions are established by the Court.

While GM did comply with this Court's December 15 Order regarding depositions in the sense that Mr. Timm did appear, GM's counsel obstructed the deposition and deprived plaintiffs of any meaningful ability to obtain either complete information about the activities of GM counsel in the early 1980's or a usable trial deposition.[2] GM was represented at the Timm deposition by Mr. Jeffrey Rosen of Kirkland & Ellis.[3] Rather than merely characterize the conduct of GM counsel, and of Mr. Timm, we ask that this Court review the deposition of Mr. Timm. It should not take much review for the Court to understand the problems which confronted us. Unfortunately,

[2] The deposition was not concluded. The parties to *Cameron* were subject to an Order in that case requiring that lead counsel negotiate about settlement in good faith in a face to face meeting within a certain time period. Plaintiffs' counsel had been seeking such a meeting for some time, in recognition of developing calendar conflicts. GM counsel insisted the meeting take place on December 16—the date this Court had ordered the Timm deposition take place. After a late lunch break during the Timm deposition, lead counsel for plaintiffs (the undersigned) and lead counsel for GM (Mr. Hickey) conferred about settlement. GM insisted that plaintiffs' counsel contact the *Cameron* plaintiffs. It became apparent that plaintiffs' counsel could not both comply with the Order for good faith negotiations, which required extensive client contact, and this Court's order to depose Mr. Timm on December 16. GM elected to offer to bring Mr. Timm back at a later date to conclude his deposition.

[3] Although GM's lead counsel Mr. Hickey was present in the Dykema, Gossett offices in Detroit where the deposition was being held, he did not attend the deposition. Messrs. Dreyer and Davis were likewise not present.

given Magistrate Carr's December 13 Order, we may not provide the Timm deposition to the Court.[4]

4. We ask that the Court enter an interim order that the sealed Timm deposition be submitted to and opened by this Court, so that we may then address, for the Court, the two issues which arose just last Friday, December 16:

> — Additional evidence pertinent to the crime-fraud exception; and
>
> —The need for clear guidelines for such depositions in the future.

Neither issue can be further explicated by counsel for plaintiff Laura Bishop prior to entry of such an interim order. A motion seeking such an order is being filed, courtesy copy attached.

5. We further ask that the Court enter an order governing the taking of the depositions pursuant to this Court's December 15 Order. To that end, we provide the Court with a copy of the Standing Order entered by Honorable G. Ross Anderson on December 13, 1993, applicable to all cases assigned to him. (Judge Anderson was Judge Haden's predecessor as presiding judge for the *Cameron* case.)

We are filing a brief motion in that regard as well, and urgently request the Court's consideration. GM announced, when the Timm deposition was adjourned, that it planned to ask questions. The object is clear: GM plans through the conduct of its counsel to deny plaintiff any meaningful opportunity to develop trial testimony, while at the same time seizing the

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[4] GM is quite clearly engaged in an ongoing effort to savage the reputation of plaintiffs' counsel, and would seize upon any opportunity to claim, once again, that plaintiff's counsel has "violated" a court order. That attempt to set up a "tu quoque"response to plaintiffs' charges against GM and its counsel is a principal strategy of GM. We will strictly abide by the terms of Magistrate Carr's December 13, 1994 Order until relief is provided by this Court.

opportunity to present it's 'side' of the issues which caused this Court to order that these depositions be taken. That seems fundamentally unfair. We respectfully submit that, absent entry of such an order (and compliance by GM), there is little to be gained from going through with depositions of GM counsel and paralegals, as the Timm transcript will show.

6. For both of the reasons suggested above — the implications of the Timm testimony to invocation of the crime-fraud exception and the conduct of GM counsel at that deposition, we are filing a motion to request that the deposition of Mr. Timm take place before the Court in Muskogee, Oklahoma. Mr. Timm is an employee of the defendant. A courtesy copy of that motion is also attached.

7. After the Court announced last Thursday its intention to hold a hearing with regard to the crime-fraud exception, we noted our belief that the Court should examine documents which GM has claimed are "privileged". We are preparing a list of such documents. Since that effort commenced (on Thursday night), the *Cameron* case has settled. GM had declined to produce two documents with respect to which Judge Haden had overruled its privilege objections, and had filed a Petition for Mandamus with the United States Court of Appeals for the Fourth Circuit. That petition is now moot. Pursuant to the stipulations that a ruling in *Cameron* constitutes a ruling in Bishop, which means the November 4 ruling applies in *Bishop*, we ask that the Court order GM to produce, to plaintiffs, the two documents which have thus far been withheld. (GM may then petition for mandamus to the Tenth Circuit, if it so chooses.) We believe those two documents may be of importance to the crime fraud issue.

8. We are continuing our analysis of the law regarding how evidence pertinent to the crime-fraud exception should be presented, but we respectfully submit that plaintiff Laura Bishop has a right to present such evidence and should be given a full

opportunity to do so, inasmuch as GM's use of privileges is intended to deprive her, specifically, of information which she believes may not properly be concealed under the circumstances. In particular, plaintiff Laura Bishop respectfully urges the Court to hold that GM has waived its privilege with respect to testimony by Ronald Elwell regarding the circumstances of the deposition testimony referred to Wednesday by Mr. Greenfield. That is a simple waiver issue, yet the answers to such questions are presumably pertinent to the crime-fraud issue.[5]

9. We believe Mr. Elwell's deposition should be continued as part of the hearing this Court holds regarding possible invocation of the crime-fraud exception, as we expect there to be substantially more testimony from him pertinent to that issue, which testimony plaintiffs had no opportunity to adduce when Mr. Greenfield's conflict necessitated an adjournment of the deposition.

10. GM has not produced to plaintiffs in *Cameron* two of the documents which, on November 4, Judge Haden ruled were not privileged. Instead, GM filed a petition for mandamus in the Fourth Circuit.

Sincerely,

BUTLER, WOOTEN,
OVERBY & CHEELEY

/s/ James E. Butler, Jr.
James E. Butler, Jr.

JEB: shw
Enclosures

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[5] After five years of litigation involving GM's trucks, Mrs. Bishop's counsel may have an awareness of the facts which enables them to fully explore this subject.

cc: Bob Cheeley
Pete Daughtery
Lee Tarte Wallace
John Hickey (via facsimile)
Jay Lefkowitz (via facsimile)
Kyle Dreyer
Mary Quinn Cooper
Arthur Greenfield
Camp Bonds
Warren Jackman
Weldon Stout
Dan George